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Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

BRIEF FOR DETROIT INTERNATIONAL BRIDGE COMPANY

OPINION BELOW

The opinion of the lower court—the Supreme Court of the State of Michigan (R. 23-28)—is reported in 267 Mich. 384, 255 N. W. 368. (See opinion in earlier case, 257 Mich. 52, 240 N. W. 68, 287 U. S. 295.)

JURISDICTION

A statement of the Detroit International Bridge Company, appellant, setting forth the basis on which the review of the judgment of the Supreme Court of Michi-

gan is here invoked on appeal has been heretofore filed with this Court in this cause in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction has been noted by the Court.

STATEMENT

The Detroit International Bridge Company, the appellant, is a corporation organized under the laws of the State of Michigan, with its principal office at Detroit, Wayne County, Michigan. The purpose and power of this corporation was to construct, and upon completion of the construction, to operate, a bridge for vehicular and pedestrian traffic across the Detroit River, a navigable stream, from Detroit, Michigan, to Sandwich, Ontario, Canada.

The original provisions of Article III appearing in the Articles of Association of the Detroit International Bridge Company as filed at the time of incorporation on June 21st, 1927, limited its power solely to the following purpose (R. 19):

> "ARTICLE III.
>
> The purpose or purposes of this corporation are as follows:
>
> Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada."

Later, on August 5th, 1927, Article III of the Articles of Association of the Detroit International Bridge Company was amended so as to expressly provide for the acquisition and maintenance of real estate and other

powers which it believed were purely incidental powers of any corporation, neither limiting nor extending the general and primary corporate purpose of owning, operating and maintaining this international highway bridge (R. 19-22).

Permission and authority for the construction of the American portion of this bridge was granted by an Act of Congress, approved March 4th, 1921, and amended subsequently by several later Acts of Congress. Permission and authority for the construction of the Canadian portion of the bridge was granted to the Canadian Transit Company, a subsidiary of Detroit International Bridge Company, which owns the Canadian portion of the bridge, by an Act of Parliament of the Dominion of Canada finally approved by the Governor General of Canada on March 31st, 1927.

The appellant, Detroit International Bridge Company, the American company, owns the bridge structure up to the middle of the Detroit River. The Canadian Transit Company owns the other portion of the bridge structure from Canada to the center of the river. All of the stock of the Canadian Transit Company, the subsidiary company, is owned by the American company, the Detroit International Bridge Company, the appellant. The Canadian Transit Company leased the Canadian portion of the bridge to the parent company, the Detroit International Bridge Company, and the appellant, the Detroit International Bridge Company operates the entire bridge, including the Canadian portion of the structure as one operating unit from Detroit to Canada and from Canada to Detroit, having the obligation to maintain and keep in repair the entire bridge structure.

Upon the completion of the construction of this bridge in October, 1929, and continuously thereafter, the De-

troit International Bridge Company, appellant, has itself, through its own officers and employees, operated this bridge, charging vehicular and pedestrian traffic a toll as approved by the War Department. Limited by its corporate powers and purpose the Bridge Company has engaged exclusively in the carrying on of this business since October, 1929, and in no other.

Upon incorporation in 1927, the Detroit International Bridge Company paid the Secretary of State for the State of Michigan the franchise or organization fee for the privilege of *being* a corporation under Act No. 85 of the Public Acts of 1921, Secs. 3 and 3A, as amended by Act No. 33 of the Public Acts of 1927. This organization or franchise fee was paid for the privilege of bringing into being, for the privilege of being or continuing to exist or to be a corporation. Distinguished from this organization or franchise tax, Michigan also imposes an annual privilege fee upon corporations under Sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, Sections 4 and 5. As will be pointed out hereinafter, this annual privilege fee is imposed upon domestic and foreign corporations for the privilege of exercising corporate franchises, and for the privilege of doing business in Michigan.

After the Detroit International Bridge Company, the appellant, had commenced to operate this international bridge it contended that it was not subject to the payment of the annual privilege fee for the privilege of doing business in Michigan, because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would

be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

This question was raised by the appellant in an appeal involving the constitutionality of the same statute for the year of 1930, In *Re Detroit International Bridge Company,* 257 Mich. 52, and an appeal was taken from the Supreme Court of Michigan to the Supreme Court of the United States, *Detroit International Bridge Company v. Corporation Tax Appeal Board of Michigan,* 287 U. S. 295. In the appeal to the Supreme Court of the United States counsel for the Corporation Tax Appeal Board contended that under Article III of the Articles of Association as amended on August 5th, 1927, (R. 19-22) the appellant had the power to engage in business other than the operation of the bridge and that these powers were local in nature. The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge and neither enlarged nor limited its primary purpose and power. The United States Supreme Court at page 297 in its decision did not pass upon the constitutionality of the Act, but said:—

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5th, 1927, were merely incidental to the primary power, it never-

theless caused said Article III to be amended on May 3rd, 1933, so as to read as follows (R. 7):

"ARTICLE III.

The purpose or purposes of this corporation are as follows:

To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This, in substance, is similar to Article III that appeared in the original Articles of Association (R. 19). The Corporation has no other power or purpose whatsoever.

On August 30th, 1933, the Detroit International Bridge Company filed its annual report for the year 1933 as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3rd, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

"It is, therefore, the position of the Detroit International Bridge Company that it is not subject

> to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States'' (R. 12 and 13).

In the 1933 annual report filed, the bridge structure was designated as used exclusively in interstate or foreign commerce (R. 8-12, at 12).

The Secretary of State on October 26th, 1933, held that appellant was subject to the full tax, and further stated that the amendment to the Articles of Association which limited the corporate powers substantially as they appeared in the original Articles of Association did not affect the 1933 annual report since the report showed the statement of conditions as of December 1st, 1932, and the amendment was adopted in May of 1933 (R. 14). Counsel for the appellant, Detroit International Bridge Company, thereupon advised the Secretary of State that under the ruling of *In Re Johnston-Newton* Co., 226 Mich. 40, that the privilege tax for the year 1933 was for the period from September 1st, 1933, to August 31st, 1934, and that the reference to the December 31st, 1932, condition was only as to the financial condition upon which the annual fee could be computed, but that it had no reference whatsoever as to the powers with which the Corporation was vested, and it had no bearing upon the privilege for which the fee was being paid (R. 14, 15). It was admitted by the Secretary of State that the reference back to December 31st, 1932, only pertained to the financial condition

upon which the tax was computed, and had no bearing upon the privilege and power to be exercised by the Corporation for the ensuing yearly period from September 1st, 1933, to August 31st, 1934, and appellant was told to disregard the first assertion of the Secretary of State that the 1933 amendment to the Articles of Association was not to be considered (R. 17).

Appellant appealed from the determination of the Secretary of State, filing its appeal with the Corporation Tax Appeal Board on November 3rd, 1933 (R. 15, 16). The Corporation Tax Appeal Board on November 21st, 1933, made a determination sustaining the ruling of the Secretary of State (R. 18). From that determination appellant, Detroit International Bridge Company filed a petition (in the nature of a petition for a writ of certiorari) to the Supreme Court of the State of Michigan (R. 1-18).

The validity of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, Sections 4 and 5, is herein question. Through an inadvertence, in the petition for writ of certiorari in the appeal to the Supreme Court of Michigan reference was incorrectly made to the Act, in paragraphs 9 (1) and (2) (R. 4, 5), but counsel by stipulation filed after the printed record was filed corrected this misreference, and the court passed upon the validity of Act No. 175 of the Public Acts of 1929, Sections 4 and 5, which is here involved.

The Michigan Supreme Court rendered an opinion on June 4th, 1934, sustaining the determination of the Corporation Tax Appeal Board, 267 Mich. 384, 255 N. W. 368 (R. 23-28), and entered a judgment in accordance with its opinion on June 29th, 1934 (R. 28, 29). From this determination of the Supreme Court of Michigan appellant here appeals.

SPECIFICATION OF ERRORS TO BE URGED AND QUESTION PRESENTED

The question here presented to the Court is set forth in the three Assignments of Error filed by the appellant in lodging this appeal. The three Assignments of Error (R. 33, 34) are here urged, as follows:

> (1) The Supreme Court of the State of Michigan erred in holding (a) that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929 of the State of Michigan (Sections 10140, 10143, 10144 and 10145 of the Compiled Laws of Michigan, 1929, inclusive) is constitutional in application to plaintiff and its business, (b) said Act, so far as applied to plaintiff, does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and (c) in applying said statute and imposing the privilege fee for the year 1933 upon plaintiff, the State of Michigan did not unduly interfere with and thereby usurp or violate the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States.
>
> (2) The tax imposed by Section 4 of said Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act 175 of the Public Acts of 1929 of the State of Michigan, not being imposed on the privilege to be a corporation (such tax being imposed by Section 3 of said Act No. 85 of the Public Acts of 1921, as amended by Section 3 of Act No. 175 of the Public Acts of 1929, but being imposed on the privilege to do the business for which organized and such business of the plaintiff being solely and exclusively the maintenance and operation of an instrumentality of foreign commerce, viz., an international highway toll bridge such privilege (as distinguished from the privilege

to be organized as a corporation with power to do such business if permitted by the competent authority) is not grantable by or otherwise within the competency of the State of Michigan, but is solely within the jurisdiction of Congress under Article I, Section 8, Clause 3 of the Constitution of the United States and the Supreme Court of the State of Michigan erred in not holding said Section 4 of said Act not applicable to plaintiff and its business or not valid under said provision of the United States Constitution if so applied.

(3) Under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929, of the State of Michigan, it is provided that in computing the annual privilege fee imposed upon corporations that property used exclusively in foreign commerce be excluded from the computation of the tax; that even if the imposition of said tax upon petitioner and plaintiff in error is proper (which we deny), the Supreme Court of the State of Michigan erred in not excluding from the computation of said tax the property of the petitioner and plaintiff in error, which is used exclusively in foreign commerce.

MICHIGAN STATUTES INVOLVED

The question here to be determined on this appeal is whether or not the statute providing for the payment of an annual privilege fee by corporations can be constitutionally applied to, and whether this annual tax can be validly imposed upon, the appellant corporation. The section of the statute in question, Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, is:

"Sec. 4. Privilege fee, Basis of. Every corporation organized or doing business under the

> laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Section 3 of Act No. 85 of the Public Acts of 1921, in force at the time the appellant corporation was organized, provided for the payment by every domestic corporation organized for profit and every foreign corporation applying for admission to do business within the State "of an organization fee—for the privilege of exercising its franchise within the state." This organization tax was paid by the Detroit International Bridge Company to the State upon incorporation. This provision of the Act, Sec. 3, reads as follows:

> "Sec. 3. Every domestic corporation hereafter organized for profit, and every foreign corporation for profit hereafter applying for admission to do business within this state, shall at the time of filing its articles or applying for admission, as the case may be, pay to the secretary of state, as

> an organization fee and for the privilege of exercising its franchises within this state, a sum equal to one mill upon the dollar for each dollar of the authorized capital stock of such corporation; and each corporation heretofore or hereafter incorporated under the laws of or admitted to do business in this state, shall pay a proportionate fee upon each and any increase in its authorized capital stock made subsequent to the passage of this act. * * * "

Section 3 of Act No. 175 of the Public Acts of 1929, in force in 1929, having similar provisions, except that the franchise fee imposed under that act was reduced to one-half mill. The other language in this section of the statute is identical.

We have further submitted that even though appellant Corporation were otherwise subject to the imposition of the annual privilege fee, that under Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 5 of Act No. 175 of the Public Acts of 1929 of the State of Michigan, the portion of the Corporation's property used exclusively in interstate or foreign commerce should have been excluded from the computation of the tax. Section 5 of Act No. 175 of the Public Acts of 1929 for the State of Michigan provides as follows:

> "In the case of computing the franchise and privilege fees prescribed by sections three and four of this act, respectively, both as to domestic and foreign corporations, such computation shall be made upon the corporation's property, both tangible and intangible, owned or used in Michigan in the ratio that such property bears to the entire property of the corporation, and such ratio shall be applied by the secretary of state to determine the amount of the authorized capital stock owned or used in Michigan and to determine what portion

of the corporation's paid-up capital and surplus severally, are owned or used in Michigan. The term 'surplus' as used in this act shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the privilege fee thereon, by reason of any impairment of the same. **None of the property or capital of any corporation subject to paying the privilege fee prescribed in Section Four which is located without the State of Michigan, and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation of the net amount of the authorized capital, or the capital and surplus, as the case may be, upon which the computation of the privilege fees shall be made;** Provided, That in determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, such property shall be considered to be located, owned or used in this state for the purposes hereof, if used in or acquired from the conduct of its business in this state, irrespective of the domicile of the corporation. The secretary of state shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least one dollar, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the secretary of state, whichever may be the higher.

(Bold face our own to call attention of the Court to pertinent provision of this section.)

In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purpose of this act."

ARGUMENT

When the Detroit International Bridge Company appealed the case involving the 1930 privilege fee to the United States Supreme Court, counsel for the Corporation Tax Appeal Board raised a factual question as to whether or not the incidental powers contained in the amended Article III were so broad that it might then be said that the Detroit International Bridge Company had power to engage in business (local in nature) other than the exclusive operation of this international highway bridge. The United States Supreme Court because of this asserted factual defense did not pass upon the question of whether or not the appellant was engaged in foreign commerce and whether or not the State of Michigan could validly impose the annual privilege fee.

Article III of the Articles of Association were thereupon amended by appellant Corporation on May 3rd, 1933, so that it appears in substantially the form contained in the original Articles of Association as filed. The incidental purposes contained in the first amendment of August 5th, 1927, were eliminated and it is now indisputable that the only power appellant Corporation has under its Articles of Association is to own, operate and maintain this international highway bridge. The issues are now, therefore, admittedly clear cut and defined.

There are three major issues here involved. The appellant, Detroit International Bridge Company, contends:

(1) that by owning, operating and maintaining the Detroit International bridge for vehicular and pedestrian traffic across the Detroit River, a navigable stream, from Detroit, Michigan, to Sandwich, Ontario, Canada, that it is and has been engaged exclusively in the business of foreign commerce;

(2) that the Detroit International Bridge Company, the appellant, was not subject to the payment of the annual privilege fee for the year 1930 under sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, sections 4 and 5, because that statute imposed an annual tax upon corporations for the privilege of *doing* business (as distinguished from the privilege of *being* or continuing to exist or *to be* a corporation); because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

(3) Even if the Detroit International Bridge Company were subject to the annual privilege fee, which we deny, nevertheless that portion of its capital represented by the bridge structure which is used exclusively in foreign commerce, under the express working of the taxing statute, should be excluded from the computation of the tax.

The Appellant, Detroit International Bridge Company, by owning, operating and maintaining the International Bridge from Detroit, Michigan, to Canada was engaged exclusively in foreign commerce.

The appellant, Detroit International Bridge Company, upon the completion of the bridge structure was the owner of the Detroit International Bridge and was engaged in maintaining and operating this highway bridge for the passage of vehicular and pedestrian traffic from Detroit, Michigan, to Sandwich, Ontario, Canada, charging and collecting tolls for the passage of traffic thereover.

Upon the completion of the bridge in 1929, and continuously thereafter, the Detroit International Bridge Company, the appellant, has, through its own offiicers and employees, maintained and operated this bridge. The appellant engaged in no other business whatsoever.

Under the provisions of Article III as amended on May 3rd, 1933, and at the time of filing its 1933 annual report, the powers of the appellant Corporation were limited solely to these purposes: (R. 7).

> "To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and the appurtenances thereto and to own all or part of said bridge and approaches and appurtenances thereto.
>
> To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

It is now indisputable in this appeal that the appellant Corporation has engaged in no other business than

the owning, operating and maintaining of this international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, and that under its corporate powers it can engage in no other business whatsoever.

It is the position of the appellant, Detroit International Bridge Company, that it is engaged exclusively in foreign commerce. The Corporation Tax Appeal Board, however, contends that by owning, operating and maintaining a highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, the Detroit International Bridge Company is not engaged in foreign commerce, and in this contention was sustained by the Supreme Court of Michigan. *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 267 Mich. 384.

Appellant relies upon the cases of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, and *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 as here controlling. In the *Covington* case the Covington & Cincinnati Bridge Company was organized under the laws of both Ohio and Kentucky. The Bridge Company built and itself operated a bridge, (as does the Detroit International Bridge Company) spanning the Ohio River, charging toll for vehicular and pedestrian traffic crossing over this structure. Kentucky enacted certain laws in reference to the toll rate and operation of the bridge, which the Bridge Company in that case contended was in violation of the Commerce Clause of the Federal Constitution. The Bridge Company in that case also contended that the Kentucky enactment impaired the obligation of contract, in that the original acts of incorporation under special concurrent acts of legislature of Kentucky and Ohio providing for the construction of this bridge constituted such a contract between the corpor-

ation and both states, which could not be altered by one state without the consent of the other. The Court of Appeals of Kentucky sustained the Kentucky Act regulating the tolls. All of the justices of the United States Supreme Court voted for a reversal of the judgment of the Kentucky Court of Appeals, four of the justices, however, basing their decision on the ground that the Kentucky Act impaired the obligation of contract. The majority of the court, favoring reversal, based their decision upon the ground that the proposed legislation contravened the Commerce Clause of the Constitution.

Mr. Justice Brown, speaking for the majority of the court, said at p. 217:

> "This case involves the right of one State to fix charges for the transportation of persons and property over a bridge connecting it with another State, without the assent of Congress or such other State, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.
>
> The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, in which the State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State. 'Congress alone,' said the court, (page 204), 'therefore, can deal with such trans-

portation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States.' If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line—in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to *travel in person* from Cincinnati to Covington; and while the reasons which influenced this court to hold in the *Wabash case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden,* 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as

> much a tax upon commerce as a toll upon a turnpike is a tax upon traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax is laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

In disposing of this case, the Michigan Supreme Court in its first opinion, 257 Michigan, 52, at p. 60, said:

> "* * * in *Covington, etc., Bridge Co. v. Kentucky,* 154 U. S. 204 (14 Sup. Ct. 1087), the State sought to regulate the rates of fare fo passage over a bridge spanning the Ohio river,"

which statement was amplified by the Michigan Supreme Court in its opinion, here appealed from, *Detroit International Bridge Co. v. Corporation Tax Appeal Board,* 267 Mich. 384, at p. 387, where it is said:

> "There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff.
>
> Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business. * * *
>
> It will be noted that the tolls constituted a direct burden upon the people who used the bridge in interstate commerce."

The Michigan Court following the argument of appellee, Corporation Tax Appeal Board, emphasizes the fact that the appellant, Detroit International Bridge Company,

merely operates an instrumentality of foreign commerce, but that it is not engaged in foreign commerce in that it does not physically transport persons or vehicles over the bridge, and that those persons walking over or crossing over by vehicle and not the Bridge Company are the ones engaged in foreign commerce.

Counsel for the appellee and the Michigan Supreme Court attempt to distinguish the case of *Covington & Cincinnati Bridge Company v. Kentucky, supra,* from the case at bar on the grounds that the question there involved was the power of a State to regulate tolls of an interstate bridge, whereas in the case at bar the question involved is the power of the State to impose a privilege tax for operating the bridge, and the mere operation of the bridge does not constitute the engaging in commerce. This attempt to distinguish the *Covington* case is unsound. It is most significant that in the *Covington* case, the court cited and relied as its principal authority upon the case of *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196. The *Gloucester* case did not involve the attempt of a state to regulate the tolls of an interstate Ferry Company operating from the shores of one state to the shores of another state, but determined, as does the case at bar, the constitutional limitation upon the power of a state to impose a capital stock tax upon the defendant Ferry Company in the nature of a privilege tax for the privilege of exercising its corporate franchise.

In the *Gloucester Ferry Company* case, the Gloucester Ferry Company, plaintiff in error, was a New Jersey corporation which maintained and operated a ferry across the Delaware River from the town of Gloucester, New Jersey, to Philadelphia, Pennsylvania, and ferried passengers and freight across the river between those places. It never transacted any other business, just as in the

case at bar, the appellant, Detroit International Bridge Company, has never engaged or transacted any other business but that of operating and maintaining this international highway bridge between Detroit, Michigan, and Sandwich, Ontario, Canada. The Ferry Company leased a dock in Philadelphia, which was needed for its business. It owned no other property in Philadelphia. The State of Pennsylvania attempted to impose an annual privilege tax on the Ferry Company, a foreign corporation "doing business in this Commonwealth or having capital employed in this Commonwealth". The Ferry Company contended, as the appellant, Detroit International Bridge Company, here contends, that it was engaged exclusively in interstate commerce, and that the State of Pennsylvania could not impose this annual privilege tax upon it for doing business since the only business in which it had engaged was that of foreign commerce, and that by so doing the State of Pennsylvania was violating the Commerce Clause of the Constitution of the United States. The Supreme Court of Pennsylvania sustained the tax imposed by the State of Pennsylvania, just as the State of Michigan in the case at bar has sustained the annual privilege tax imposed by the State of Michigan. The United States Supreme Court in the *Gloucester* case reversed the Pennsylvania Court of Appeals and held that the attempted imposition of this privilege tax was in violation of the Constitution of the United States.

In the *Gloucester Ferry Company* case the Attorney General for the State of Pennsylvania in his argument raised the question at 114 U. S. 202, that:

> "* * * if a ferry business is rather in aid of commerce than commerce itself * * * then we submit that the tax is not an interference with commerce* * *"

just as counsel for the appellant contend that the operation and maintenance of an international highway bridge is merely in aid of, or an instrument of, foreign commerce, and that the imposition of the privilege tax here questioned is not for the privilege of engaging in foreign commerce. The Supreme Court of the United States in the *Gloucester Ferry Company* case said at p. 203:

> "It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which that commerce may be carried on,* and the means by which it may be aided and encouraged (italics our own). The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern

> the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress."

Relying upon its decision and rule in the *Gloucester Ferry Company* case, this court in the *Covington & Cincinnati Bridge Company* case holds that the operation of an interstate bridge is like the operation of an interstate ferry, and there is no difference in the application of the rule because one is stationary and the other movable. It must follow, therefore, because of the reliance by the court in its opinion in the *Covington* case upon the decision of the *Gloucester Ferry Company* case, that if the operation of a bridge were involved instead of the operation of a ferry that the result would have been the same; that is that an attempt by a state to impose a capital stock tax in the nature of an annual privilege fee upon the corporation for the purpose of operating an interstate bridge (ferry) was in violation of the Commerce Clause of the Federal Constitution. And though the power of a court to regulate tolls of an interstate bridge was involved in the *Covington* case (which is the attempted basis for a distinc-

tion by the Michigan Court for the case at bar), the United States Supreme Court in the *Covington* case relies as authority for its decision upon a case which involved a privilege tax, the question there determined being similar to that presented in the case at bar.

It is particularly significant that this court in the same term in which it decided the *Covington* case said, in the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 439, at p. 446 (italics our own):—

> "All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no State shall attempt to impose the added burden of a license or other tax for the *privilege of using, constructing, or operating any bridge*, or other instrumentality of interstate commerce, or for the carrying on of such commerce."

Although a direct property tax was involved in the *Backus* case, as distinguished from a privilege tax involved in the case at bar, nevertheless the court in the *Backus* case, having in mind the *Covington* case decision which the court decided in that very same term, would not have made the foregoing statement about the power of a state to tax the privilege of *using*, construcing or *operating* an interstate bridge, if as counsel for appellee in the case at bar contend, the court in the *Covington* case did not regard the operation of an interstate highway bridge as engaging in interstate commerce.

The cases of *Henderson Bridge Company v. Kentucky*, 166 U. S. 150, and *Arkansas & Memphis Railway Bridge & Terminal Co. v. State*, 174 Ark. 420, 295 S. W. 378, relied upon by the appellee and cited as controlling by the Michigan Supreme Court are distinguishable from the case at bar.

In the *Henderson Bridge* case, the Bridge Company was incorporated under the laws of Kentucky and was also granted certain powers and privileges under the laws of Indiana. The Company constructed, owned, maintained and operated a railroad bridge across the Ohio River from Kentucky to Indiana. The Board of Valuation and Assessment for the State of Kentucky made an assessment against the Bridge Company and not only included the tangible physical property of the Bridge Company located in Kentucky, but also valued the franchise granted to the incorporators by the State of Kentucky in so far as that franchise was referable to the Kentucky portion of the bridge. The Bridge Company refused to pay that portion of the tax which was predicated upon the assessment of the franchise contending that this portion of the tax was in fact a franchise tax or a privilege tax for the privilege of engaging in this interstate business, and being a tax upon the privilege of doing business violated the Commerce Clause of the United States. The court by a majority opinion, four of the Justices joining in a vigorous dissent, decided as appears on pg. 154 of the opinion:

> "The tax in controversy was nothing more than a tax on the intangible property of the Company in Kentucky."

The majority treated the tax as a direct personal property tax, including this franchise as an intangible asset. Clearly even though the bridge were engaged in interstate commerce, it was then and is now well decided that a direct property tax may be imposed by a sovereignty upon corporate assets located within that sovereignty, even though those assets are used exclusively in interstate commerce. *St. Louis & East St. Louis Ry. Co. v.*

State of Missouri, 256 U. S. 314; *United States Express Company v. Minnesota,* 223 U. S. 335; *Fargo v. Hart,* 193 U. S. 490; *Postal Telegraph & Cable Co. v. Charleston,* 153 U. S. 692, 700.

In the case of *Greene v. Louis & Interurban R. R. Co.,* 244 U. S. 499, this court restated the rule of the *Henderson case,* saying at the bottom of p. 510:

> "It has been held by the Kentucky Court of Appeals, and by this court, that the 'capital stock of the corporation,' here referred to, includes its entire property of every kind and description, tangible and intangible, and that what is called a 'franchise tax' is nothing else than a tax upon the intangible property of the company in Kentucky. *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150, 154. *Henderson Bridge Co. v. Commonwealth,* 99 Ky. 623, 639, 641."

The tax upon the franchise in the *Henderson* case was nothing more than a direct property tax upon the value of a franchise as intangible personal property, which was located within the State of Kentucky, and was not imposed for the exercise of any corporate privilege.

The statement of the Court in the *Henderson* case, upon which appellee and the Michigan Court rely in the case at bar, that the tax was not a tax on interstate commerce carried on by means of the bridge because the Bridge Company did not transact such business, and that only the persons going over the bridge carried on the business of interstate commerce, was wholly unnecessary to the decision in the *Henderson* case and is not now binding upon the court. Treating the tax as a direct property tax as distinguished from the tax for the privilege of doing business within the state like the tax in the case at bar, the decision of the Supreme Court in the *Hender-*

son case would necessarily have been the same as it was regardless of whether the Bridge Company were engaged in interstate commerce or not.

Four of the Justices joining in the dissenting opinion of the minority in the *Henderson* case differed from the majority of the court in determining the nature of the Kentucky tax, as well as on the question of whether or not the Bridge Company was engaged in interstate commerce. The minority of the court treated the Kentucky tax as a pure franchise or privilege tax, as distinguished from a direct property tax and submitted that in its opinion that this tax being imposed upon the privilege of doing the business in question and was unconstitutional as being a direct imposition of a tax for the privilege of doing interstate business.

Mr. Justice White, who wrote the dissenting opinion in which three other justices of the court concurred, two of whom had joined in the majority opinion in the *Covington & Cincinnati Bridge Company case,* said at p. 166:

> "• • • *it is a tax upon the value of the exercise of the privilege of using the bridge, of charging for the running of locomotives across the bridge, and of doing the business of interstate commerce in any form,* I cannot bring my mind to the conclusion that the tax is only levied on the mere franchise to exist as a corporation conferred by the State of Kentucky."

Further treating with the dictum in the majority opinion that the interstate commerce was carried on by the individuals going over the bridge and was not carried on by the Bridge Company, Mr. Justice White, expressing the dissenting opinion of the court, said at p. 168:

"The contention that although the traffic over the bridge may be interstate commerce and the receipts from said traffic be interstate commerce receipts, yet the tolls paid to the bridge company are not receipts from interstate commerce business transacted by the bridge company, is a mere distinction without a difference. What, may I again ask, is the toll paid to the company for the use of the bridge but the result of a contract entered into for the purpose of carrying on interstate commerce? In the *Covington Bridge* case the sole question was as to the right of the State of Kentucky to regulate the amount of tolls to be received by the bridge company. The right of the State was denied on the ground that the tolls were a matter of interstate commerce, that is, that the business of operating the bridge and charging for the use thereof was interstate commerce and not subject to state control. In that case then, the tolls were adjudged to be receipts from interstate commerce; in the case at bar, they are declared not so to be. The far-reaching consequence of this asserted distinction is well calculated to arouse solicitude for the future. A large portion of the interstate commerce business of the country is carried on by freight lines. These lines arrange with the railways for transportation, pay them a charge or toll, and upon this basis afford the public increased business facilities. Under the supposed distinction all this interstate commerce traffic ceases to be such, and the whole of the gross receipts become taxable in every State through which the business passes. The freight lines do not transport the merchandise; the railways do; therefore the receipts of the freight lines as to such lines are not interstate commerce receipts. This illustration is but one of the many which at once suggest themselves. All the express business, the sleeping car business, the tank lines, and manifold other forms of interstate commerce, will be stricken down if the rule now applied to the tolls of an interstate

bridge be enforced as to other means of interstate commerce.

Where, also, I submit, does a distinction exist between this case and the case of the ferry between Pennslyvania and New Jersey, considered in the *Gloucester Ferry* case, or the attempt of the State of Illinois to regulate freight charges between that State and New York, embraced in the *Wabash* case, supra? Manifestly, there is an irreconcilable conflict between the decision in this case and the rulings of the court in the cases just cited. It follows that in order to maintain the tax in the case at bar the decisions referred to must be and are, as I conceive, substantially overruled by the opinion now announced."

The majority of the court in the *Henderson* case did not, by its opinion, consider that *Covington & Cincinnati Bridge Company* case overruled. On page 153 the court said:

> "The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, presented an entirely different question."

And the minority of the court in the *Henderson* case expressly stated that the *Covington & Cincinnati Bridge Company* case and the *Gloucester Ferry Company* case were directly in point and there applicable, just as we contend they are here applicable in the case at bar.

To summarize the statement in the majority opinion of the court in the *Henderson Bridge Company* case that the bridge company was not engaged in interstate commerce is pure dictum, not necessary to the decision and is not here controlling. The ruling of the majority of the court in the *Henderson Bridge Company* case may be summarized as follows: A state may impose a property tax upon a Bridge Company which owns, operates and maintains a

bridge from one state to another on that portion of the tangible and intangible property of the Bridge Company located within the taxing state, the tax being a direct property tax as distinguished from a privilege tax for a corporate privilege of operating said bridge. With this rule we are wholly in accord. That question is not involved in the case at bar. The dictum in that case that the Bridge Company was not engaged in interstate commerce was wholly unnecessary to that decision and is not here controlling. However, if the tax involved in the *Henderson Bridge Company* case was a privilege tax for the privilege of owning, operating and maintaining the bridge from one state to another, as the minority of the court in the *Henderson Bridge Company* case held, then the dissenting opinion should be given the weight of judicial determination.

The other case relied upon by appellee and the Michigan Supreme Court, *Arkansas & Memphis Railway, Bridge & Terminal Co. v. State*, supra, can be distinguished from the case at bar. In that case the Bridge Company did not itself operate the bridge, but leased the structure to other persons, who in turn operated the structure. As the court in the *Arkansas* case, said, referring to the appellant, at page 425:

> "*It does not operate the bridge and does not carry either passengers or goods, in fact it does nothing in the way of commerce, either intrastate or interstate.* It owns, leases, repairs and maintains the bridge across the Mississippi river, and, while the bridge may be an instrumentality of interstate commerce so far as the carriers are concerned, the bridge company has nothing whatever to do with carrying either freight or passengers and therefore does not use the bridge as an instrumentality for interstate commerce or any other kind of commerce."

And further at page 426:

> "As we have said, the bridge company merely owns the bridge, *leases* it and maintains it. If a company owned a boat or a number of boats, and leased them to a carrier or to any person or corporation who used the boat in carrying persons or freight in interstate commerce, the boat would be used in interstate commerce, the carrier would be engaged in interstate commerce, but the owner of the boat would have no connection whatever with interstate commerce. And we therefore think that the bridge company in this case is not engaged in interstate commerce, and it is not engaged in the operation of an instrumentality used in interstate commerce."

In the case at bar the Detroit International Bridge Company itself operates the bridge. It engages in the foreign commerce of furnishing the structure for transporting people across the Detroit River over and upon its highway structure. The transporting of vehicles and persons from one country to another over a highway structure is as much engaging in foreign commerce as though they were transported by boat or train.

In the *Arkansas* case, the court stated that if a ferry company owning ferry boats leased the boats to another company, as did the bridge company in the *Arkansas* case, that the company owning and maintaining the ferry boats, but leasing the same to another company which operated them, would not be carrying on interstate commerce. Following this reasoning, then if the ferry company in the *Gloucester Ferry Co. v. Pennsylvania* case, supra, leased boats to another company, which operated them, or if the Bridge Company in the case at bar leased the bridge to another company, which operated the bridge, then the company could not claim to be engaged in interstate or

foreign commerce. However, in the case at bar, as in the *Gloucester Ferry* case, the Bridge Company does *not* lease out the operation of the bridge, and, therefore, the Arkansas case cannot be authority for the claim of the appellee that a company that actually maintains and operates an interstate bridge or an interstate ferry is not engaged in interstate commerce.

Counsel for the Corporation Tax Appeal Board cannot be sustained in their contention that the appellant is not engaged in foreign commerce. In the case at bar it is impossible to use the bridge in other than foreign commerce. From the very inception of its construction it has been exclusively an instrumentality of foreign commerce — physically incapable of any other use.

A company owning and operating ferry boats carrying passengers from one state to another or from this country to another has been held to be engaged in the business of interstate and foreign commerce. *Glouster Ferry Co. v. Pennsylvania,* 114 U. S. 196 (supra); *City of Sault Ste. Marie v. International Transit Co.,* 234 U. S. 333; *Mayor of Vadalia v. McNeeley,* 274 U. S. 676.

A company owning and operating a pipe line for gas or oil from one state to or through another state has been held by this court on several occasions to be engaged in the business of interstate commerce. *Ozark Pipe Line Corporation v. Monier, the State Tax Commission of Missouri,* 266 U. S. 555; *Eureka Pipe Line Co. v. Hallanan,* 257 U. S. 265; *United Fuel & Gas Co. v. Hallanan,* 257 U. S. 277.

To hold that the spanning of a stream by ferry boats from the shore of one state to that of another, or the spanning of distances by pipe lines through which gas or oil flows is interstate commerce, and on the other

hand to contend, as does the Corporation Tax Appeal Board, that the spanning of the distance by a bridge over a navigable stream over which vehicles and pedestrians travel from the shore of one state to that of another state or country is not interstate or foreign commerce is to raise a fine distinction with no essential difference. The position is inconsistent and insupportable.

A telephone company carrying on operations from one state to another provides the wires over which a person in one state may communicate with a person in another state, just as an interstate bridge company affords the means for a person to travel from one state to another.

A telephone company merely affords the instrumentality over which the voice of a person is carried from one state to another. Without physical expression of the person using the telephone the mere affording of the instrumentality would be insufficient to carry on the interstate commerce.

The Detroit International Bridge Company, the appellant, transports passengers and vehicles over this structure as much as a ferry company, by its boats, transports its passengers, or as much as a pipe line company transports oil or gas, or a telephone carries the voice of a person in one state to another. If the bridge were a swing or draw bridge actually moving and lifting the passengers and vehicles from one shore to another, that contention could not be raised. To hold that a swinging or draw bridge would thereby constitute the appellant's business as that of foreign commerce, and a stationary bridge, such as the one here involved, would not be foreign commerce, merely emphasizes the fine hairpoint distinction counsel for the appellee attempt to make. As has been pointed out hereinabove,

this court has ruled out any attempt to distinguish a bridge from a ferry boat on the ground that one is movable and the other is a fixture in the *Covington Bridge Company* case, *supra.*

The United States Supreme Court has held that the Federal government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce. In the case of *Luxton v. North River Bridge Co.,* 153 U. S. 525, 530, the court said:

> "From these premises, the conclusion appears to be inevitable that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."

This same rule was announced in the case of *California v. Central Pacific Ry. Co.,* 127 U. S. 1, 36; *Latinette v. City of St. Louis,* 201 Fed. 676; *Stockton v. Baltimore New York Ry. Co.,* 32 Fed. 9; *Wilson v Shaw,* 204 U. S. 24. I the ownership, operation and maintenance of a bridge from one state to another or from one country to another was not engaging in interstate or foreign commerce, then clearly the Federal government would have no power under the Commerce Clause of the Constitution to authorize a Federal corporation to *construct, own* and *operate* such a bridge as was held proper in the *Luxton* case.

The Detroit International Bridge Company, the appellant, owning, operating and maintaining this highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada, must be held to be engaged in foreign commerce.

The Appellant, Detroit International Bridge Company, has no power under its corporate charter to engage in any other business than that of maintaining and operating this international highway bridge, and since its incorporation has engaged exclusively in this business.

When the Detroit International Bridge Company was first organized the purpose clause of the Articles of Incorporation filed on June 21st, 1927, limited its power solely to the following purposes (R. 19):

ARTICLE III.

"The purpose or purposes of this corporation are as follows:

Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada."

Later, on August 5th, 1927, Article III of the Articles of Incorporation of the Detroit International Bridge Company was amended so as to expressly provide for the acquisition and maintenance of real estate and other powers which it believed were purely incidental powers of any corporation, neither limiting or extending the general and primary corporate purpose of owning, operating and maintaining this international highway bridge.

The Corporation questioned the power of the State of Michigan to impose the 1930 annual privilege tax under

the same law, still in effect, and appealed to this Court from the determination of the Michigan Supreme Court sustaining the imposition of that tax.

The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge. The United States Supreme Court in its decision (287 U. S. 295) did not pass upon the constitutionality of the Act, but said at page 297:—

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5th, 1927, were merely incidental to the primary power, nevertheless it caused Article III to be amended on May 3rd, 1933, so as to read as follows (R. 7):

> "ARTICLE III.
>
> The purpose or purposes of this corporation are as follows:
>
> To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This in substance, is similar to Article III that appeared in the original Articles of Association.

On August 30th, 1933, the Detroit International Bridge Company filed its annual report for the year 1933 as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3rd, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

> "It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States" (R. 13; see statement in 1933 report, R. 12).

In the annual report filed, the bridge structure was designated as used exclusively in interstate or foreign commerce (R. 15).

At the time of filing the annual report for 1933 here involved in this present appeal, counsel for the Corpora-

tion Tax Appeal Board have at no time, either in the hearing before the Corporation Tax Appeal Board or on the Appeal to the Michigan Supreme Court or in the appeal to this court, contraverted the statement of the appellant that it has no other power under its charter and is engaged in no other business but that of operating and maintaining the international highway bridge from Detroit, Michigan, to Sandwich, Ontario, Canada. This is the only power which the corporation has under its corporate charter and is the only business in which it has ever engaged since its inception.

Counsel for the Corporation Tax Appeal Board now claim that the power to maintain and the maintenance of that portion of the bridge situated within the State of Michigan is a purely local power. This contention is without merit.

The same claim was made by the Attorney General of Pennsylvania in the case of *Gloucester Ferry Co. v. Pennsylvania* supra, in which he contended that since the Ferry Company had the power and did operate and maintain a dock in Pennsylvania that that portion was purely local in nature, and, therefore, gave the State of Pennsylvania power to impose the annual privilege tax. This court in disposing of this contention said in 114 U. S. at p. 203:—

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of pas-

> sengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation."

It has been held that one engaged in maintaining in proper condition a bridge used as an instrumentality of interstate commerce is engaged in interstate commerce. In the case of *Pedersen v. Delaware, Lackawanna & Western Rd. Co.*, 229 U. S. 146, one carrying materials to be used in repairing a bridge over which interstate trains moved was held to be engaged in interstate commerce, Mr. Justice Van Devanter, delivering the opinion of the court, there said among other things, at pg. 151:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

One engaged in cooking meals, making beds, etc., for a gang of bridge carpenters in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing bridges over which interstate trains moved was held to be engaged in interstate commerce. *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101. The court said, at pg. 103:—

> "Taking it to be settled by the decision of this court in *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152, that the

repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it."

In *Kinzell v. Chicago Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, it was held that one engaged in connection with the construction of a fill to replace a trestle (bridge) over which interstate trains moved was engaged in interstate commerce.

The United States Supreme Court has gone so far to hold that *ownership only* of a railroad *wholly within one state leased* to a railroad company doing interstate business and having exclusive possession and control for a yearly money rental would subject the lessor owner to liability as being engaged in interstate commerce, where an injury was sustained by an employee in the course of movement by the lessee railroad of a train of wholly empty cars. *North Carolina Railroad Company v. Zachary*, 232 U. S. 248.

In *State v. Bates & Rogers Construction Company*, 91 Wash. 183, 157 Pac. 483, employees of an *independent contractor* constructing piers under and for the support of a bridge on the line of the Spokane International Railroad Company over which interstate and foreign traffic moved were held to be engaged in interstate and foreign commerce.

It is indisputable that at the time of filing the 1933 annual report here involved that the appellant, Detroit International Bridge Company, was restricted by Article III of its corporate charter to the sole business of oper-

ating and maintaining this international highway bridge; that it was then engaged and could engage in no other business; that this business was and is exclusively that of foreign commerce.

The Detroit International Bridge Company is Not Subject to the Annual Privilege Tax. The Corporation, Limited by Its Corporate Charter has Been and Is Engaged Exclusively in Foreign Commerce, and to Impose the Annual Tax upon It for the Privilege of Engaging in this Foreign Commerce would be in Violation of Article 1, Section 8, Clause 3, of the Constitution of the United States.

The Michigan Supreme Court erred in sustaining the Corporation Tax Appeal Board of the State of Michigan in its holding that the imposition of the annual privilege fee upon the Detroit International Bridge Company, the appellant, under Act No. 85 of the Public Acts of 1921 as amended by Act No. 175 of the Public Acts of 1929 of the State of Michigan, Sections 3 and 4, was not in violation and in contravention of Article 1, Section 8, Clause 3 of the Constitution of the United States.

As has been pointed out hereinafter, Detroit International Bridge Company, the appellant, has been and is exclusively engaged in the business of operating this international bridge, and restricted by its corporate power to this purpose, has and could engage in no other business whatever except the carrying on of this foreign commerce.

The nature of Act No. 85 of the Public Acts of 1921, of the State of Michigan, Section 4, which, subject to amendment by Act 175 of Public Acts of 1929, Section 4, which did not change the nature thereof, is here in question, has been carefully analyzed and defined by the

Supreme Court of Michigan in a case in which the validity of the statute was attacked as being repugnant to certain provisions of the Constitution of the State of Michigan. The Supreme Court of Michigan, in that case, *Union Steam Pump Sales Company v. Secretary of State of Michigan,* 216 Mich 261, held "that it is not a property tax, but is a tax on the franchise to do business as a corporation within the state."

Distinguishing the franchise "to be" a corporation from the franchise of doing business as a corporation, the Michigan Supreme Court, after quoting at length from numerous authorities and text writers, summarized, page 272, saying:

> "These authorities demonstrate beyond cavil that there is a distinction and a well recognized one between the franchise to be a corporation and the franchise to do business as a corporation. *One is the franchise 'to be,' the other the franchise 'to do.'*. One belongs to the corporators, the other to the corporation. * * * The franchise 'to do' (belonging to the corporation) may follow the franchise 'to be' (belonging to the corporators). But each is a different franchise as the authorities above cited demonstrate and the taxation of one is not the taxation of the other, the sources of revenue are not the same, the subjects of taxation are not the same."

It was concluded by the Court, at page 268, that "The law here under consideration levies a specific tax upon the right, the franchise *to do* business as a corporation."

The privilege tax in question in the case at bar is, therefore, imposed upon the privilege of doing business and is unlike the annual privilege tax imposed in many states upon the privilege of being, or continuing to be, a corporation. The case of *Kansas City, Fort*

Scott & Memphis Ry. Co. v. State of Kansas, 240 U. S. 227, relied upon by appellee, is different from the case at bar, because in that case the annual privilege fee was imposed upon the privilege of being, or continuing to be, a corporation rather than on the privilege of doing business as a corporation. If the annual privilege tax in the case at bar were likened to that imposed in the *Kansas City* case, it would be in violation of the Michigan Constitution because the receipts from this tax are payable to a different fund than is provided under the Michigan Constitution, under the ruling of the *Union Steam Pump Sales Co.,* case, *supra.* It was necessary for the Court in the *Union Steam Pump Sales Company* case to carefully distinguish between the two different corporate franchise taxes in that the proceeds of the tax were payable to the school fund under the State Constitution if the tax were upon the privilege *to be* a corporation, whereas payments under Act No. 85 of the Public Acts of 1921, as amended, here in question, were to be credited to the general fund, and the validity of the act could only be sustained if this was a tax imposed for the privilege of *doing* business as a corporation. The case of *Ashley v. Ryan,* 153 U. S. 437, relied upon by appellee is like the Kansas case and is not in point.

The Detroit International Bridge Company, the appellant, upon its organization, paid the organization fee to the State of Michigan for the privilege of *being* a corporation. Once this privilege fee is paid upon organization there is no provision under the Michigan laws under which a further tax for this privilege of *being* is imposed. The annual privilege fee, Act No. 85 of the Public Acts of 1921, as amended, on the other hand, as has been determined by the Michigan Supreme Court, and as is apparent from the language of the statute, is for

the privilege of *doing* business as a corporation. To hold that this annual privilege fee was for the privilege of being or continuing to be a corporation would be to violate the Michigan Constitution under the decision of the *Union Steam Pump Sales Company* case (*supra*).

Counsel for the appellee contends, and we agree, that the Michigan annual privilege tax is imposed on a corporation not for the actual doing or carrying on of the business permitted under its charter, but for the privilege of exercising the corporate franchise and for the privilege of doing the business permitted under its charter, whether the privilege is exercised or not. *People of the State of Michigan v. Michigan Trust Co.*, 286 U. S. 334; *G. H. Hammond Co.*, 246 Mich. 179; *Cobbs & Mitchell v. Corporation Tax Appeal Board*, 252 Mich. 479. The 1929 amendment adopted after the *Hammond* case expressly included in the Act the ruling of that case. This annual privilege tax, however, cannot and should not be confused with the organization or franchise tax imposed upon the corporation upon its organization for the privilege of being a corporation or continuing to be a corporation, which tax has already been paid by the appellant upon its organization. The cases relied upon by appellee involve annual privilege taxes imposed upon corporations for the privilege of being or continuing to be a corporation which is not the kind of privilege tax here involved, since such a tax would require the payment of the proceeds to a fund specified under the constitution of the State of Michigan, which is a different fund than that specified under this annual privilege tax act. This act, if construed as a tax on the privilege to be or to continue to be, would be in violation of the Michigan constitution. *Union Steam Pump Sales Co. v. Secretary of State,* supra.

Attention should further be called to the case of *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* 288 U. S. 218; 77 L. Ed. 711. Although this court pointed out in that case that the Alabama statute was unlike the Michigan statute, in that the Alabama statute imposed the tax for the doing of business, whereas the Michigan statute imposed the annual tax for the *privilege of doing the business.* However, that distinction is not pertinent in the case at bar. If the appellant had power to do a local business under its charter but did not exercise this privilege, then the distinction might become pertinent as it was in the Michigan case of *G. H. Hammond Company,* supra. The appellant has no power under its charter to engage in any local business whatsoever. Not only does appellant Corporation engage exclusively in the business of foreign commerce, but it has no power under its charter to engage in any other business. To impose the privilege tax for the privilege of exercising its corporate powers, when the sole corporate power of appellant is to engage in foreign commerce, is to impose a privilege tax upon the appellant for the privilege of engaging in foreign commerce.

The annual privilege tax of Michigan then is for the privilege of doing the business permitted to be done under the corporate charter, whether the business is actually carried on by the corporation or not. However, in the case at bar the only business which the appellant Corporation may carry on under its charter is that of engaging in foreign commerce. It has no power whatsoever to engage in any business of a local nature. The proposition then is whether the State of Michigan has the power to impose a tax upon the appellant Corporation for the privilege of engaging in foreign commerce since that is the only business in which the corporate charter permits the appellant Company to engage.

The principle of Constitutional law, that a state cannot impose a tax or fee upon interstate and foreign commerce is too firmly established to require the voluminous citation of authorities that pronounce the rule. It should suffice to refer to a few leading cases. This principle was broadly announced in the *Minnesota Rate* case, 230 U. S. 352, at pg. 400 as follows:—

> "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or *the privilege of engaging in it*, or upon the receipts (see numerous authorities there cited)."

Ozark Pipe Line Corporation v. Monier, et. al., 226 U. S. 555 (*supra*), constituting the State Tax Commission of the State of Missouri, and cases therein cited. See the recent statement of the United States Supreme Court in the case of *Minnesota v. Blasius*, 54 Sup. Ct. 34, at page 36 and cases therein cited.

The cases of *Philadelphia & Southern Steamship Company v. Pennsylvania*, 122 U. S. 327, 7. Sup. Ct. 1118, 30 L. Ed. 1200, and *Ozark Pipe Line Corporation v. Monier, et. al., (supra)*, should be controlling of the issues here involved. In the *Philadelphia & Southern Steamship Company* case the Steamship Company engaged exclusively in the business of operating sea-going steamships for ocean transportation between the different states of the United States by way of the ocean, and between the United States and foreign countries. The state of Pennsylvania enacted a law whereby it attempted to impose a tax upon the gross receipts of such companies derived from the transportation of persons and property by sea between different states and to and from foreign countries. The Philadelphia & Southern Steamship Com-

pany was a domestic corporation organized under the laws of Pennsylvania. As Mr. Justice Bradley, speaking for the Supreme Court, announced at pg. 335:—

> "This question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress."

The Court held, at pg. 336, that:—

> "The transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this Court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the states upon that branch of commerce would be a palpable interference."

In commenting upon this case in the Detroit International Bridge Company, the Michigan Supreme Court in its first opinion (257 Mich. 52) said:

> "The tax was levied upon the gross receipts of a steamship company * * * "

thereby leaving the inference that such a tax was to be distinguished from the imposition of an annual privilege tax. It must be noted, however, that in the *Steamship Company* case a large portion of the opinion of the Court was devoted to the consideration of the tax imposed upon the Steamship Company as being in the nature of a franchise tax. It was contended by the State of Pennsylvania in that case that the tax was upon the franchise of the corporation granted to it by the State. And commenting upon this issue, the Court, at pg. 342, said:—

> "If intended as a tax on the *franchise of doing business,*—which in this case is the business of transportation and carrying on interstate and foreign commerce,—it would clearly be unconstitutional. It was held by this Court in the case of *Gloucester Ferry Company, v. Pennsylvania,* 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

So to summarize, if this annual tax imposed by Pennsylvania upon the Steamship Company, measured by its gross receipts, was in the nature of a privilege tax for doing business, as was contended by the Attorney General of Pennsylvania, such a tax, according to the ruling of the United States Supreme Court in that case, would be unconstitutional and in violation of the Commerce Clause. The issues there determined are identical to those presented to the Court in the case at bar.

As was decided in the case of *Sault Ste. Marie, v. International Transit Company,* 234 U. S. 333, 340, (*supra*), a state may not make commercial intercourse with another state or a foreign country a matter of local privilege, and require that it can not be carried

on without its consent, or exact a fee as the price of its consent for the privilege of doing this interstate foreign business. This Court in the case of *In Re Detroit International Bridge Company*, 257 Mich. 52, said that this case could be distinguished because the City sought to enforce the collection of a license fee. It is respectfully submitted by the appellant that the imposition of a license fee is for the privilege of conducting business, just as the privilege fee imposed by the State of Michigan by Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, is for the privilege of engaging in the business permitted by the corporate charter of the Company, and since the only power which appellant has under that charter is to engage in the business of foreign commerce, the imposition of this privilege fee is imposed for the privilege of engaging exclusively in foreign commerce and, therefore, contravenes the Commerce Clause of the Federal Constitution.

The case of *Ozark Pipe Line Corporation v. Monier* (*supra*) can not be distinguished and is conclusive upon the question here before the Court for determination. In that case the State of Missouri attempted to impose an annual privilege tax upon the Ozark Pipe Line Corporation for the privilege of doing business in the State. The nature of the Missouri tax was similar to that of the Michigan annual privilege tax. It was imposed on a corporation for the privilege of doing business in the State, as distingushed from such privilege taxes as are imposed by some states for the privilege of being, or continuing to be, a corporation. The Ozark Pipe Line Corporation was a foreign corporation, the sole business of which was to transport crude oil from one state to another through its pipe lines. It engaged exclusively in interstate commerce. In Mis-

souri it carried crude oil through its pipes from one state, through Missouri, to another state. The United States Supreme Court held that this tax was unconstitutional. Mr. Justice Sutherland, speaking for the Court, at page 562, stated:

> "The tax is one upon the privilege or right to do business, *State Ex rel. v. State Tax Commission*, 282 Mo. 213, 234; *and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed.* It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."

This Court recently followed the same rule in the case of *State Tax Commission of Mississippi v. Interstate Natural Gas Company*, 284 U. S. 41, 52 Sup. Ct. 62.

The Michigan Supreme Court in its opinion appearing in 257 Michigan at page 60 said that the *Ozark Pipe Line* case and the *Interstate Natural Gas Company* case could be distinguished in that in those cases:

> "The state sought to enforce a statute providing for the collection of such a tax on corporations not organized under its laws and exclusively engaged in interstate commerce."

However, the United States Supreme Court in the *Monier* case held that this same rule must apply to a domestic corporation, where the tax sought to be imposed is one upon the privilege of doing business and the only business done or that can be done by the domestic corporation is interstate or foreign business. Com-

menting on this point, Mr. Justice Sutherland speaking for the court said at page 567:

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. *The State has no such power even in the case of domestic corporations. See Philadelphia S. S. Co. v. Pennsylvania,* 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

The argument was made in the case of *Philadelphia & Southern Steamship Company v. Pennsylvania supra,* that although this tax for the doing of interstate or foreign business could not be imposed upon a foreign corporation, it might nevertheless be imposed upon a domestic corporation, which derives its powers from the State. The Court in the *Philadelphia and Southern Steamship Company* case, at page 344 said:

> "The decision in this case and the reasoning on which it is founded so far as they relate to the taxation of interstate commerce carried on by corporations, *apply equally to domestic and foreign corporations.* No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise."

We are not unmindful of the case *In re Detroit & Windsor Ferry Company,* 232 Mich. 574. That case is not here controlling and furthermore can be distinguished from the case at bar. In that case the business of the Ferry Company was not restricted exclusively to foreign commerce. A portion of its business was devoted to intrastate business, that is, operating a ferry service to and from Belle Isle, which is a part of the City of Detroit. The Detroit and Windsor Ferry Company could and did engage in intrastate commerce and had the ability and power under its charter and the purposes therein enumerated and granted, to devote itself to business other than purely foreign or interstate commerce.

In the case at bar the Detroit International Bridge Company is restricted by the corporate powers granted to it by its charter to operate an international highway bridge, and under these limited powers, it can engage in no business other than that of this foreign commerce.

A corporation only possesses such powers as are expressly enumerated in and granted to it by its charter as limited by its Articles of Association. The corporation has no inherent rights such as belong to individuals. Its activities must be confined specifically to those powers granted to it under its charter and the very grant of enumerated powers of necessity excludes any other powers not therein mentioned. This is the general and prevailing rule of law in this country. *Thompson on Corporations,* 3rd Ed. Vol 3, Sec. 2183; *Fletcher Cyc. Corporations,* Vol. 2, Secs. 775 and 784. And this is and has been the prevailing rule in Michigan since the earliest times. In the case of *Bank of Michigan v. Miles,* 1 Douglas (Michigan) 401, the doctrine is forcibly pronounced at page 403 as follows:—

"In these cases the grant of power is before us. The charter defines the grant, with its restrictions and limitations. • • •

A corporation, says Ch. J. Marshall, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence: *Trustees of Dartmouth College v. Woodward,* 4 Wheat., 518. The same doctrine is asserted by McLean J., in *Beatty v. Knowles' Lessee,* 4 Pet., 152, and is, in effect, contained in all the American cases on the subject. • • •

In determining on the extent of such power in a particular instance, under a charter, we are to look at the grant and restriction; and, unless the power is found in the charter, it cannot be considered as possessed. The very grant of specified powers under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter."

See *Orr v. Lacey,* 2 Douglas (Michigan) 230; *People v. River Raisin & Lake Erie Railroad Co.,* 12 Michigan 389, 395.

In the *Detroit and Windsor Ferry Company* case it might well have been said, as counsel for the Corporation Tax Appeal Board will undoubtedly argue, that the Ferry Company was required to pay for the privilege of doing corporate business whether it exercised the privilege or not since the Ferry Company had the power and did engage in business other than that of foreign commerce. Quite different is the case at bar where the Detroit International Bridge Company can engage in no business except that of operating this international highway bridge, its operations being exclusively devoted to that of foreign commerce. It can-

not forcibly or logically be argued that the International Bridge Company should be compelled to pay an annual tax for the privilege of doing an intrastate business whether it exercises this privilege or not, since it is not ever within its powers to exercise the privilege of doing intrastate business.

If this tax is imposed for the privilege of doing business upon the Bridge Company, it is and must be imposed upon it for the privilege of engaging exclusively in foreign commerce and nothing else. And clearly to impose a tax upon a corporation for the privilege of engaging in foreign commerce is in violation of the Commerce Clause of the United States Constitution.

The Michigan Supreme Court in its second opinion, *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 267 Mich. 384, said at p. 387:

> "We need not inquire whether plaintiff has any intrastate power under satutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases dealing with taxation and the regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and *In re Detroit & Windsor Ferry Co.*, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee."

If the court announced as a rule in the *Windsor Ferry Co.* case, and relied upon that decision in the case at bar, on the broad grounds that the annual privilege tax was not a burden on foreign commerce, regardless of the fact that the Ferry Company had power under its

charter to do a local business, which appellant has not in the case at bar, we submit that the court erred in the *Windsor Ferry Co. case*, as it did in the case at bar, and that this court, as has been pointed out hereinabove upon review, should determine that the attempted imposition of the annual privilege tax upon appellant for the privilege of engaging in foreign commerce is in violation of the Commerce Clause of the Federal Constitution.

Even if the Detroit International Bridge Company were Subject to the Annual Privilege Fee, which We Deny, Nevertheless that Portion of its Capital Represented by the Bridge Structure which is Used Exlusively in Foreign Commerce, Under the Express Wording of the Taxing Statute, Should Be Excluded from the Computation of the Tax.

The Taxing Statute, Act No. 85 of the Public Acts of 1921 as amended by Act 175 of the Public Acts of 1929, Section 5, of the State of Michigan, provides that:

> "None of the capital or surplus of said corporation represented by *property exclusively used in interstate commerce* shall in any case enter into computation of the net amount of the authorized capital or the capital and surplus as the case may be, upon which the computation of the privilege fees shall be made."

This provision of the Act clearly was intended to exclude not only property exclusively used in interstate commerce but that property of a corporation which was exclusively used in foreign commerce as well. To construe the statute otherwise would be to discriminate against domestic corporations that have properties which are used exclusively in foreign commerce as compared with companies having properties used exclusively in inter-

state commerce which latter companies would derive the benefit of the exclusion clause. It might be argued that such a ruling would be in contravention of the Fourteenth Amendment to the Constitution of the United States in denying equal protection of the laws.

If the Bridge Company is subject to this tax at all, the bridge structure consisting of land, bridge structure, equipment and all appurtenances thereto should not, under the express provisions of this Taxing Statute, have been included in the computation. As has been pointed out heretofore, the bridge structure under the ruling of the *Covington* case is an instrument of foreign commerce. It is used and operated by the Detroit International Bridge Commpany exclusivcly in this foreign commerce and for no other purpose whatever. So if the Bridge Company is required to pay this annual privilege tax, that portion of its capital stock which is represented by the bridge structure, land and necessary appurtenances thereto should, under the express wording of the statute, be excluded from the computation of the tax.

The Michigan Supreme Court, 267 Mich. 384, said at p. 387:

> "However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. *In re Detroit & Windsor Ferry Co., supra.*
>
> There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But the question under the statute is whether it is used in such commerce by plaintiff."

As has been pointed out in the first portion of our brief, the ownership and operation of this international highway bridge by appellant is engaging in foreign commerce. The Michigan Supreme Court erred in holding otherwise. Although we submit that the appellant Corporation is not subject to the corporation privilege tax at all, even if it were subject to the annual tax, in no event should the bridge property used exclusively in foreign commerce be included in the computation.

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of the State of Michigan should be reversed.

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